

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CIVIL REVISION APPLICATION No. 1234 of 1994****For Approval and Signature:****HON'BLE MISS JUSTICE R.M.DOSHIT**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to civil judge ?
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**HEIRS OF MEHABOOB SAHEB BISMILLAH SAHEB, HASANMOHAMMAD SAHEB & 6 -
Applicant(s)**

Versus

**HEIRS OF ABDUL RAHIM KHUDABAX SUGARABIBI, W/O AR KHUDABAX & 5 -
Opponent(s)**

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Appearance :

MR CHINMAY M. GANDHI for Mr. MB GANDHI for Petitioners

MR JK PARMAR for Respondent No(s).: 1, 2.

RULE SERVED for Respondent No(s).: 3, 4, 5, 6.

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CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date : 08/08/2005

ORAL JUDGMENT

Feeling aggrieved by the judgment and order dated 31st March, 1994 passed by the appellate Bench, Small Causes Court, Ahmedabad in Civil Appeal no. 106 of 1993,

the appellants-plaintiffs in HRP Suit No. 4508 of 1970 have preferred the present Revision Application under Section 29 (2) of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 [hereinafter referred to as, "**the Rent Act**"].

The predecessor of the respondents was the tenant in the suit premises situated at Ahmedabad for a monthly rent of Rs. 5=50 paise. The petitioners-plaintiffs instituted HRP Suit No. 4508 of 1970 in the Court of Small Causes, Ahmedabad for recovery of possession of the suit premises and the amount of arrears of rent. According to the plaintiffs, the defendants were in arrears of rent since 22nd February, 1968 and the plaintiffs required the suit premises for demolition and construction of a house for their personal use. The said suit came to be decreed in favour of the plaintiffs by the judgment and order dated 9th June, 1975. The said decree was *set-aside* by the appellate bench on 23rd February, 1979 in Civil Appeal No. 171 of 1975. The appellate bench was of the opinion that after the death of the original tenant, the question of transmission of tenancy as envisaged by Section 5 [11](c) (i) of the Rent Act was not decided. Until the said question was decided, the suit for eviction was not maintainable.

Feeling aggrieved, the plaintiffs preferred Civil Revision Application No. 1271 of 1979 before this Court. The said Revision Application came to be allowed by this Court [Coram : *S.D Dave, J.*] on 29th November, 1991. Relying upon the Full Bench judgment in the matter of **Babubhai @ Jayantilal Kalyanbhai & Ors. vs. Shah Bharatkumar Ratilal & Ors.** [21 GLR 103], *His Lordship* held that, "...It is now clear that when the original tenant dies and the question regarding the transmission of the tenancy is not decided before hand the suit cannot be said to be a premature one and that the question regarding the transmission of the tenancy can be decided in the same suit." In view of the above observation, *His Lordship* held that, "...the matter requires to be remanded to the trial Court with the direction to decide the question of transmission and then to decide the question as to whether the plaintiffs-landlords are entitled to a decree for eviction against the defendant-tenant either under Section 12 (3)(a) or Section 12 (3)(b) of the Bombay Rents Act, 1947 along with the question as to whether the plaintiff-landlords are entitled to a decree of eviction on the ground that the suit premises are reasonably and bona fide required for the personal use and occupation of the plaintiffs-landlords." The Court

allowed the Revision Application and set-aside the judgments and decrees of the Courts below. The suit was remanded to the trial Court for a fresh decision in light of the observations made in the judgment.

Since the order of remand, the trial Court, by its judgment and order dated 30th September, 1993 allowed the suit and passed decree for eviction against the defendant as envisaged by Section 12 [3](a) of the Rent Act. It should be noted that inspite of specific direction issued by the High Court, the trial Court did not raise the issue as to the transmission of tenancy on the death of the original tenant nor the said issue was decided by the trial Court. It further appears that the parties also did not press the said issue. The plaintiffs did not press for eviction on the ground that they required the suit premises bona fide for demolition and for raising a new structure for their personal use.

Feeling aggrieved, the defendants-tenants preferred Civil Appeal No. 106 of 1993 before the appellate bench, Small Causes Court, Ahmedabad. The appellate Bench was of the opinion that in the notice of demand given under Section 12 (2) of the Rent Act and in the plaint, the plaintiffs specifically contended that the defendants

were liable to pay the education cess in addition to the monthly rent payable to the plaintiffs. Thus, the plaintiffs made out a case other than the one under Section 12 (3)(a) of the Rent Act. However, though, it was found that as the annual rent of the suit premises was less than Rs. 100/=-, the education cess was not leviable. Nevertheless, the defendants were given out an impression that the matter fell out of the purview of Section 12 (3)(a) of the Rent Act. The defendants were, therefore, not liable to pay rent within one month from the date of the demand made by the plaintiffs. Further, the defendants did deposit the amount of rent due before the first day of the hearing of the suit and continued to pay the rent pending the suit. Hence, the defendants were entitled to protection against eviction under Section 12 [3](b) of the Rent Act. The lower appellate Court relied upon the judgment of this Court in the matter of **Lalubhai Harichand v. Heirs of Khodidas Haribhai** [1979 (16) GLT 31 (Gujarat)]. As the defendants had deposited the rent before the trial Court, the decree for eviction was set-aside. Feeling aggrieved, the plaintiffs-landlords have preferred the present Revision Application.

It is indisputable that in the notice of demand [Exh.22], the plaintiffs did say that over and above the

agreed rent, the defendants were liable to pay the education cess. The said claim was repeated in the pleadings also. In the above referred judgment of Lalubhai Harichand, in similar facts, this Court has held that, **"..defendant-tenant after receiving notice will be led to think that on account of demand of municipal taxes and education cess, he need not pay the arrears of rent within one month and he can pay the same at any time before institution of the suit. Therefore, even if there was a mistake in the notice under Sec. 12 (2) of the Act, that mistake cannot sustain a decree for eviction when before filing of the suit, the tenant has tendered all the arrears of rent."**

The above referred observation shall necessarily apply to the present case also. As recorded hereinabove, the plaintiffs did claim that the defendants were liable to pay the education cess. It is well settled that when the municipal taxes or education cess is payable by the tenant, the rent cannot be said to be payable by month. Such cases would fall beyond the purview of Section 12 [3](a) of the Rent Act. In the instant case also, the defendants were led to believe that the matter at hand fell out of the purview of Section 12 [3](a) of the Rent Act. In such case, if the tenant fails to pay the rent

within one month from the date of the receipt of the notice of demand, no decree for eviction could pass against the tenant as he would be entitled to protection against eviction as envisaged by Section 12 [3](b) of the Rent Act. In the present case, the defendants did deposit the rent in the Court and thereby earned protection against eviction as envisaged by Section 12 [3](b) of the Rent Act.

No case for interference is made out. The Revision Application is dismissed with cost. **Rule** is *discharged*.

{Miss R.M Doshit, J.}

*Prakash**